United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1104

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1104

UNITED STATES OF AMERICA

APPELLEE

V.

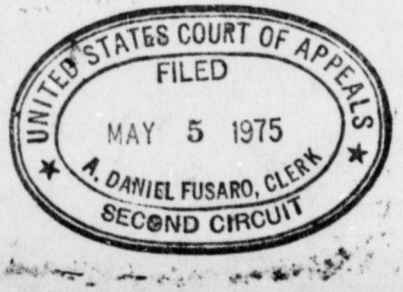
JULIAN TAYLOR

APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT

JULIAN TAYLOR



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CITATIONS

MISCELLANEOUS

STATUTES INVOLVED

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.

> Rule 4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

Plan for the United States District Court of Connecticut for Achieving Prompt Disposition of Criminal Cases.

Rule 4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-captial offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Rule 5. Excluded Periods.

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

STATEMENT OF CASE

This is an appeal from a ruling denying a Motion to Dismiss that claimed the Government was not ready for trial within six months in violation of Rule 4 of the Plan for Achieving Prompt Disposition of Criminal Cases. This Motion to Dismiss was denied from the bench by the Honorable Thomas F. Murphy, sitting by special designation in Waterbury, on September 24, 1974.

The appellant was charged (See Indictment, app. 9-10) with three other defendants with willfully and knowingly keeping in their possession and concealing certain falsely made, forged, counterfeited or altered obligations and securities of the United States in violation of 18 U.S.C. § 472 and §2. Count two was the substantive charge and count one charged the defendants with conspiring to do the same in violation of 18 U.S.C. §371.

The appellant plead guilty to count one of the indictment on September 30, 1974 and reserved his right to appeal the ruling Denying the Motion to Dismiss based on Rule 4 of the Plan

Co-defendant Marlon E. McLennan plead guilty to count one on November 11, 1974. Both Taylor and McLennan testified for the Government at the trials of co-defendant's Reuben McCrary and Walter B. Frederick. The first trial, the Honorable M. Joseph Blumenfedl presiding, resulted in a mistrial as the jurors could not reach a verdict. At the second trial The Honorable T. Emmet Clarie presiding, the defendants McCrary and Frederick were convicted on both counts (January 24, 1975).

The defendants McCrary and Frederick have also filed a notice of appeal and evidently intended to make a similar claim on an identical Motion to Dismiss filed in their respective cases.

The appellant was sentenced to three years imprisonment, execution suspended, and three years probation by the Honorable M. Joseph Blumenfeld on February 18, 1975.

A timely Notice of Appeal was filed (app. 8) on February 27, 1975.

QUESTION PRESENTED

1. Whether The District Court Erred In Denying the Defendant's Motion To Dismiss the Indictment on the Grounds that the Government Failed to Comply With Rule 4 of The Plan For The United States District Court For the District Of Connecticut For Achieving Prompt Disposition of Criminal Cases By Not Giving Adequate Notice That It Was Ready To Try The Defendants.

STATEMENT OF FACTS

The appellant was indicted on March 29, 1973 with three other co-defendants in a two count indictment charging them with wilfully and knowingly keeping in their possession and concealing certain falsely made, forged, counterfeited or altered obligations and securities of the United States in violation of Title 18 U.S.C. §472 and §2 and §371 (count one).

The appellant filed a notice of Intent to File a Motion to Dismiss on May 23, 1974. The Motion to Dismiss based on Rule 4 of the Plan for Prompt Disposition was filed on June 19, 1974. When this Motion was denied from the bench by Judge Murphy on September 24, 1974 a period of almost 18 months had lapsed since the return of the indictment.

Although the docket sheet entry for May 14, 1973 (app. 2) states "Govt. Ready to Proceed" no formal written or verbal notices of readiness were conveyed to either the Court or the defendants. The May 14, 1973 entry does not indicate who was present in Court that day or any information regarding the source or basis for the entry.

There were two periods of time during which Judge Blumenfeld, the judge to whom the case was assigned, was not available because of hip operations. The first period consisted of September 23, 1973 to approximately November 5, 1973 and the second period of time was from January 14, 1974 to approximately February 25, 1974.*/ These two periods of time, totaling approximately 12 weeks, occurred prior to the filing of the Motion to Dismiss. No attempts were made by either the Government or the Defendants to have the case transferred to another judge.

Various pre-trial motions were filed by the other three co-defendants; yet delays caused by these motions was minimal. All of the motions filed an behalf of defendant McCrary went off the calendar by agreement without a hearing. Defendant McLennan filed four pre-trial motions on April 30, 1973 and on May 21, 1973 two of the motions were placed off the calendar by agreement and his Motion to Suppress and Motion for Discovery and Inspection were denied.

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*/ These dates were personally obtained by the appellant's attorney from Judge Blumenfeld's secretary.

Attorney Thomas G. Dennis entered an appearance for defendant Frederick on June 11, 1973 as Frederick evidently had some difficulty in retaining an attorney. A Motion to Suppress was filed by Frederick on September 10, 1973. A hearing was held on this Motion on December 3, 1973 -- a delay probably caused by Judge Blumenfeld's operation. This Motion was denied in a written decision filed on January 2, 1974.

Prior to the filing of the Notice of Intent to File the Motion to Dismiss the case was on a jury assignment list on December 18, 1973 (See Docket Sheet, app. 3) but was rescheduled. This change was probably caused by Judge Blumenfeld's anticipated operation.

The Government clearly expected the appellant Taylor to cooperate and testify on its behalf from the early beginning of the case. Taylor had testified before the Grand Jury and had given indications by himself and through his counsel that he would testify for the Government. The appellant, however, never made any requests for continuances or file any motions or enter with any actions that contributed to any delays. Taylor pled guilty on September 30, 1974 reserved his right to appeal the ruling denying the Motion to Dismiss, and testified for the Government at both trials.

CHRONOLOGY OF DATES IN CASE

March 29, 1973	True Bill Returned
April 16, 1973	Defendants Taylor and McLennan pled not guilty.
April 30, 1973	Defendant Frederick pled not guilty.
May 14, 1973	Docket Sheet Entry states "Govt. Ready to Proceed".
May 21, 1973	Defendant Frederick still did not have lawyer to represent him.
December 18, 1973	Case was placed on Jury Assignment List and placed over to middle of January, 1974
May 23, 1974	Defendant Taylor filed a notice of Intent to file Motion to Dismiss Indictment Pursuant to Rule 4 of Plan
June 19, 1974	Defendant Taylor Filed a Motion to Dismiss
September 24, 1974	A hearing was held on defendant's Motion to Dismiss. All were denied from the bench by Judge Murphy. A call of the jury assignment list was made.
September 30, 1974	Defendant Taylor pled guilty to Count one of the indictment.
November 11, 1974	Defendant McLennan pled guilty to Count one

November 15, 1974	First trial ends in mistrial
January 2[illegible], 1974	Second trial--defendants McCrury and Frederick convicted on both counts.

ARGUMENT

The Government Violated Rule 4 of the Plan For Achieving Prompt Disposition of Criminal Cases In That The Government Never Gave Notice That It Was Ready To Try The Defendants.

On June 19, 1974 the Appellant moved to dismiss the indictment on the grounds that the government failed to comply with Rule 4 of the Plan For The United States District Court for the District of Connecticut for Achieving Prompt Disposition of Criminal Cases [hereinafter referred to as the Plan].*/ Rule 4 of the Plan requires the government to be ready for trial within six months from the date of the filing of the indictment or arrest, whichever is earliest.

Rule 4 was approved on February 28, 1973 and became effective on April 1, 1973. This rule superseded Rule 4*/ of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases that were promulgated on January 5, 1971 and amended on May 24, 1971

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*/ As stated in Statutes Involved on page ii.

Although these Rules are almost identical the appellant contends and will assume in this argument that the later Rule 4 applies. The very fact that the indictment was returned on March 29, 1973 only two days before the effective date of the new Connecticut Plan would seem to strongly support this conclusion.

Under the provisions of Rule 4, if the government fails to comply with the six-month notification requirement, the Court must, upon motion by the defendant, dismiss the indictment unless sufficient time may be excluded under the provisions of Rule 5*/ from the period between indictment and notification of the government's readiness for trial to bring the government into compliance. Indictments dismissed for failure to comply with Rule 4 are done so with prejudice. Hilbert v. Dooling, 476 F.2d 355, 358-59 (2d Cir. 1973), (en banc), cert. den. 414 U.S. 878 (1973). See also United States v. Furey, ____F.2d _____ No. 74-2266, (2d Cir., February 25, 1975).

In this case the Government had 10 days from the filing of the Notice of Intent to File the Motion to Dismiss on May 23, 1974

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*/ As stated in Statutes Involved on page ii.

within which to proceed to trial unless, of course, it had adequately announced its readiness or there was sufficient grounds to toll any portion of the six-months period under one or more of the exceptions of Rule 5.

a. Notice of Readiness

If the government notified the Court of its readiness for trial within the required six months the appellant has no claim. Undoubtedly the Government will contend that May 14, 1973 entry on the docket sheet that reads the "Govt. Ready to Proceed" is sufficient to conclude that the Government communicated its readiness. Even if it is assumed that this entry was a verbal communication by the Government, it cannot be assumed or inferred that this communication was made to any one other then the Clerk who made this entry. The record is absent any explanation for the Clerk's notes. What was the Government ready for?

In United States v. Pierro, 478 F.2d 386, 389 (2d Cir. 1973) the Court held that the "Government must communicate its readiness for trial in some fashion within the six-month period, as extended pursuant to Rule 5." There is no evidence in this case that the Government communicated its readiness for trial to any one in compliance with the Plan. Certainly

no formal communication was made. It should be noted that the Court in United States v. Pierro, supra, at 389 also stated that "The better practice, in those districts with heavy calendars, is to file a written notice with the Clerk of the Court (or the Judge's attention, and to serve a copy on the defendant."*/ The Court in this case was never informed during the fourteen month interval between the filing of the indictment and the filing of the Notice of Intent to file a Motion to Dismiss, either orally or in writing, that the Government was ready for trial. Consequently, the ultimate question is whether there was sufficient justification or excuse for delays that would cumulatively have tolled the time such that the six-month period had not run. See United States v. Scafo, 480 F.2d 1312 (2d Cir. 1973); cf United States v. Pierro, supra.

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*/ The United States Attorney's office adopted this very proceedure on May 1, 1974

b. Excluded Periods

The Government will probably attempt to claim the following periods of time as excluded periods under sub section (a) of Rule 5:

1.	April 30, 1973 to May 10, 1973	Pending McLennan Motions
2.	April 30, 1973 to May 21, 1973	Pending McCrary Motions
3.	September 10, 1973 to January 2, 1974	Pending Frederick Motions to Suppress
4.	September 23, 1973 to November 5, 1973	Judge Blumenfeld's absence due to first operation
5.	January 14, 1974 to February 25, 1974	Judge Blumenfeld's absence due to second operation

In considering the delay caused by pre-trial motions the maximum time that could be excluded would be the three weeks between April 30, 1973 and May 21, 1973 and the sixteen weeks and two days between September 10, 1973 to January 2, 1974. A period of one year, seven weeks and six days had lapsed between the return of the indictment and the filing of the Notice of Intent to File the Motion to Dismiss, therefore, if the combined periods mentioned above totaling 19 weeks two days

were excluded, a period of 40 weeks and two days or approximatley 10 months remains.

The period of time from January 14, 1974 to February 25, 1974 (6 weeks) will probably be claimed as an excluded period under sub section (h) of Rule 5 as a delay occasioned by exceptional circumstances. If this period is conceded as an excluded period because of Judge Blumenfeld's unavailability due to an operation a period of 34 weeks and two days still remains.*/

It could be argued that the period of delays caused by Judge Blumenfeld's absence do not qualify as excluded periods because Judge Blumenfeld could have transferred the case to a different judge and, therefore, these periods should not be used to toll the six-month period under Rule 5 (h). See United States v. Drummond, ____ F.2d ____, Docket No. 74-2264 at 1787, (2d Cir. February 11, 1975). Because the total excluded periods in this case will not bring the time within the six month period such an argument would appear to be superfluous.

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*/ The period of time for the first operation is covered by the period of time pending for defendant Frederick's Motion to Suppress.

Under sub section (g) of Rule 5 the Government will most likely claim the period of time between April 16, 1973 to June 11, 1973 as an excluded period during which the defendant Frederick was without counsel, a circumstance which was not the fault of the Court to provide counsel for an indigent defendant. It is obvious from the record (See docket sheet, app. 1-3) that the Court was most patient and helpful to Frederick; therefore the appellant concedes this period is covered by subsection (g).

This excluded period adds the periods of May 16, 1973 to April 30, 1973 (2 weeks) and May 21, 1973 to June 11, 1973 (3 weeks) as April 30, 1973 to May 21, 1973 was included in the periods for pre-trial motions. 29 weeks and two days now remains, which is one month, one week and two days beyond the six-month period.

The fact that the appellant had cooperated with the Government by testifying before the Grand Jury and had given indications that he would testify for the Government at the trials of Frederick and McCrary did not excuse the Government from its ready for tiral notice responsibility. United States v. Bosques, 364 F. Supp. 131 (D. Conn. 1973). United States v. Valot, 481 F.2d 22, 24-25 (2d Cir. 1973), would seem

to hold contrary, yet this case is distinguishable on at least two key points. First, the delay in Valot was pre-indictment and secondly, the agreement in Valot was explicit as Valot had obviously consented to the delay and waived his Rule 4 claims unlike Taylor.

Recently in United States v. Roberts, _____F.2d _____ No. 75-1052 at 2803 (2d Cir. April 9, 1975) the Court "reject[ed] any motion that a defendant in effect waives his right to a speedy trial by consenting to [a plea bargain] agreement." The facts in this case are very similar to the appellant's case as Roberts was to testify in exchange for a plea to a lesser charge and consequently Robert's quilty plea was delayed to insure his cooperation. Although Roberts dealt with Sixth Amendment claims and not Rule 4 the same reasoning should apply as Taylor did not waive his rights as provided by Rule 4!

Even if the possible excluded periods of delay are liberally construed in the favor of the Government, notice of readiness was not made within the six-month period.

The Courts have clearly stated that "the philosophy underlying these Rules seeks to vindicate the publics interest in the swift and just administration of criminal justice." United States v. Bosques, supra at 134; United States v. Lasher, 481 F.2d 229, 233 (2d Cir. 1973), cert. den., 419 U.S. 975 (1975).

Rule 4 is clear and simple as it provides the outside limit of swift and just administration of Criminal Justice for the District of Connecticut; yet the Government never attempted to make its readiness known. The Government's failure to fulfill its burden of responsiblilty was unjustified and accordingly should have resulted in a dismissal.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed, and the case remanded with a direction that the indictment be dismissed.

Respectfully submitted,

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450 Main Street
Hartford, Connecticut

Attorney for Appellant

CERTIFICATION

This is to certify that a copy of the above was delivered to the Office of the United States Attorney, Federal Building, Hartford, Connecticut.

Charles N. Sturtevant

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1104

UNITED STATES OF AMERICA

APPELLEE

V.

JULIAN TAYLOR

APPELLANT

CERTIFICATION OF SERVICE

I hereby certify that a copy of the Brief and Appendix of the defendant-appellant in the above matter was mailed postage pre-paid, to the Office of the U.S. Attorney, 450 Main Street, Hartford, Connecticut.

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